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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

SANDPIPER INVESTMENTS,
INC.,

Plaintiff, Cross-defendant, and
Appellant,

v.

BARBARA BAKER et al.,

Defendants and Respondents.

FORSTER-GILL, INC.,

Cross-complainant and
Respondent.

2d Civil No. B262883
(Super. Ct. No. CV 120017)
(San Luis Obispo County)

This case arises out of a partnership formed from a cotenancy in an apartment building. The trial court denied one cotenant's complaint for contribution to a loan secured by the apartment building, and awarded damages to the other cotenant

on a cross-complaint alleging breach of fiduciary duty. We affirm.

FACTS

In 1975 Barbara Baker and her husband William Baker acquired property in Avila Beach. They built a 22-unit apartment building on the property. The construction was financed through a loan from Citizens Savings in the amount of \$380,000 secured by the property. William Baker died in 1978.

Around 1980 Charles Pratt, who had been in partnership with William Baker on other projects, told Barbara Baker (hereafter “Baker”) that he had a 50 percent interest in the apartment building. The only evidence Pratt showed Baker was his check to William Baker that contained the words “option to purchase” on it. Based on the check, Baker conveyed a 50 percent interest to Charles Pratt in exchange for his promise to pay off the entire Citizens Savings note.

Charles Pratt transferred a half interest in his share to his wife, Marian Pratt. Eventually the Pratts transferred their interest to Sandpiper Investments, Inc. (Sandpiper). The Pratts are the sole shareholders in Sandpiper. Sandpiper and Baker operated as a partnership.

The relationship between Baker and the Pratts was acrimonious. The Pratts and Sandpiper assumed sole management and control over the apartment building to the exclusion of Baker.

The Pratts paid Baker \$1,000 per month as her share of the partnership profits. Baker twice asked for more money, but the Pratts refused her requests. A financial statement signed under penalty of perjury by Marion Pratt, as president of Sandpiper, in 1990 showed the apartment building produced a

gross monthly income of \$14,602 and a net monthly income of \$10,544.

At some point, the Pratts settled a claim with Union Oil Company for damages caused to the apartment building by an oil leak. The Pratts never accounted for or shared the proceeds of the settlement with Baker.

In 2001 Charles Pratt demanded that Baker execute documents for a \$600,000 loan with First Bank of San Luis Obispo to be secured by the apartment building. Baker expressed reluctance to sign the documents. But Charles Pratt intimidated her. He told her that if she did not sign the documents, he would reduce the monthly payment of \$1,000 she was receiving.

Baker executed a loan guarantee and a deed of trust. But she did not execute the note. Sandpiper executed the note as the only obligor.

A portion of the loan proceeds was used to pay off the original Citizens Savings loan. That is the loan Charles Pratt agreed to pay as consideration for Baker transferring to him a 50 percent interest in the apartment building. The balance of the loan proceeds, approximately \$345,000, was paid to Sandpiper. Baker received none of the proceeds. The Pratts represented to Baker that the loan proceeds would be used for maintenance and repairs on the apartment building. The Pratts made no such repairs or improvements.

In June 2005 Baker filed a complaint against Sandpiper and the Pratts for conversion, partition and an accounting. The complaint alleged Sandpiper and the Pratts breached their fiduciary duties toward Baker by excluding her from management and concealing financial information from her.

Baker alleged that Sandpiper had converted partnership funds and assets to its own benefit.

The parties executed a settlement agreement on September 15, 2006. Under the terms of the settlement agreement, the Pratts and Sandpiper agreed to pay Baker \$500,000 and 50 percent of the proceeds from the Union Oil settlement. The settlement agreement also required the parties to list the apartment building for sale. The settlement agreement contained a waiver and release of all claims occurring prior to the date of the settlement agreement.

Efforts to sell the apartment building were unsuccessful. As permitted by the settlement agreement, Baker decided to unilaterally sell her 50 percent interest in the apartment building. She did not want to sell, but she decided to sell in an effort to escape further mistreatment by the Pratts.

In July 2008 Forster-Gill, Inc. (FGI) purchased Baker's interest in the apartment building. The purchase also included an assignment of all of Baker's rights against Sandpiper and the Pratts, except for 50 percent of the money in the partnership bank account.

Counsel for Sandpiper and the Pratts received notice of the assignment prior to the September 2008 close of escrow on the sale to FGI. Baker did not file a dismissal with prejudice of her case until November 10, 2008.

In 2011 the First Bank loan came due. Sandpiper made a demand on FGI to pay half of the loan. FGI repeated its long-standing request to see a copy of the note. The Pratts refused. Sandpiper paid off the note.

On January 9, 2012, Sandpiper filed the instant complaint against Baker and FGI. The complaint alleged causes

of action for equitable contribution for one-half of the \$600,000 First Bank note, for contribution for the increase in property taxes that resulted from the sale from Baker to FGI and for partition.

On January 31, 2013, FGI filed a cross-complaint against Sandpiper for breach of fiduciary duty, accounting, conversion, fraud and partition. Sandpiper demurred to the cross-complaint on the ground of statute of limitations. The trial court applied the four-year statute for breach of fiduciary duty and accounting. The court related the four years back to the January 9, 2012, filing of Sandpiper's complaint.

The trial court found for Baker and FGI on Sandpiper's complaint for contribution to the \$600,000 First Bank loan. The court found Baker's testimony credible that Charles Pratt agreed to pay the entire Citizens Savings loan in consideration for the transfer of 50 percent interest in the apartment building. Regarding the Pratts' claim that they spent the remaining balance of the First Bank loan on repairs and maintenance of the apartment building, the court stated: "[D]espite numerous requests made both before and during trial, Sandpiper was unable to produce even a single piece of paper showing that any of the First Bank loan proceeds were used for such purposes Sandpiper failed to provide even a single witness who performed any of the work. No checks, invoices, statements, or other documentary evidence were produced."

The trial court also denied Sandpiper contribution for the increase in property taxes that resulted from Baker's transfer of her interest in the apartment building to FGI. Sandpiper cited no authority compelling departure from the normal rule that cotenants must pay property taxes in proportion to their interest

in the property. In addition, the court found: “Further, there was substantial evidence produced at trial that the Pratts essentially forced Baker to sell her interest in order to avoid continued mistreatment. Under these circumstances, equity would not be served by an order compelling an unequal contribution towards property taxes based solely on the sale of Baker’s interest to Forster-Gill. This is not a case in which substantial justice can only be accomplished by equalizing a common burden shared by co-obligors, or by preventing one obligor from profiting at the expense of others.”

On FGI’s cross-complaint, the trial court awarded damages to FGI for breach of Sandpiper’s fiduciary duties accruing after January 9, 2008; that is, four years prior to the filing of Sandpiper’s complaint. The court chose four years prior to the filing of the complaint to account for the four-year statute of limitations.

The trial court awarded damages to FGI for payments made on the First Bank loan out of partnership funds; for payments made to Charles A. Pratt Construction, Inc. and other entities for work not actually done; management fees paid to Marian Pratt; unauthorized checks paid to Sandpiper; and undisbursed profits, for a total amount of \$124,171.96 plus interest.

The apartment building was sold at a partition sale and the trial court confirmed the sale.

DISCUSSION

I

Sandpiper contends the trial court erred in concluding the 2006 settlement agreement did not release it from liability for acts occurring after the date of the settlement

agreement. All the damages the court awarded FGI on its cross-complaint were for acts occurring after the settlement agreement was signed on September 15, 2006.

A contract must be interpreted so as to give effect to the mutual intent of the parties as it existed at the time of the contracting. (Civ. Code, § 1636.) When a contract is reduced to writing, the intention is to be ascertained from the words alone, if possible. (*Id.*, § 1639.) A contract should be interpreted so as to make it lawful, operative, definite and reasonable, if that can be done without violating the intent of the parties. (*Id.*, § 1643.)

Here the settlement agreement states: “[T]his release is not intended to excuse any further breaches of any party’s obligations expressly set forth in this Agreement. This Settlement Agreement is intended to cover all Claims arising out of or related to the matters described herein, and to any act or omission by either party as owner, operator and/or managing agent of the Project, which act or omission occurred prior to the execution of this Agreement by Baker or Sandpiper, whether known or unknown, suspected or unsuspected, or matured or contingent.”

The only reasonable interpretation of the settlement agreement is that it does not release liability for acts or omissions that occurred after the settlement agreement was signed.

Sandpiper relies on the word “execution” in the settlement agreement. It claims that after the parties signed the contract, there were significant contractual duties to perform prior to entry of a dismissal with prejudice. It argues the contract remained “executory” until all the duties were performed. (Citing Civ. Code, § 1661 [“An executed contract is one, the object of which is fully performed. All others are

executory”].) It concludes the release was effective for all acts that occurred prior to the time Baker sold her interest to FGI.

But to say a contract has been executed can also mean nothing more than that a party has signed it. (See *Nielsen Construction Co. v. International Iron Products* (1993) 18 Cal.App.4th 863, 869 [“The definition of ‘executed’ also includes the meaning of ‘signed’”]; *Michie Grocery Co. v. Martin* (1920) 45 Cal.App. 659.) That is the only reasonable meaning here. Under Sandpiper’s interpretation, it and the Pratts could continue to treat Baker as they had in the past with impunity after the settlement agreement was signed until she sold her interest to FGI. We must avoid such an absurd interpretation of the settlement agreement. (Civ. Code, § 1643.)

The trial court did not err in awarding FGI damages for acts occurring after the settlement agreement was signed. All damages were awarded for acts occurring after January 9, 2008.

II

Sandpiper contends the trial court erred in concluding the settlement agreement does not require Baker to pay one-half of the \$600,000 First Bank loan.

The settlement agreement does not mention the First Bank loan. Sandpiper’s contention is based on paragraph 11 of the settlement agreement: “Upon the close of escrow and receipt of the sales price for the sale of the Project, Baker and Sandpiper shall each receive fifty percent (50%) of the net proceeds realized from the sale after . . . the payment or discharge of all outstanding obligations relating to the Project and the operation thereof . . .” Sandpiper claims the First Bank loan is an “outstanding obligation relating to the [p]roject.”

The trial court was correct in concluding that the First Bank loan was not an obligation relating to the project. Sandpiper was the sole obligor on the note. The proceeds of the loan were used in part to pay off the existing Citizens Savings loan that Charles Pratt agreed to pay as consideration for his half-interest in the project. The balance of the proceeds was paid directly to Sandpiper. Thus all of the proceeds of the loan went to the sole benefit of the Pratts. The most reasonable interpretation of the settlement agreement is that the First Bank loan was not an obligation “relating to the Project.”

III

Sandpiper contends the issues whether Pratt agreed to pay off the original Citizens Savings loan; how the First Bank proceeds were used; and whether the partnership was obligated on the monthly First Bank loan payments were “subsumed” in the settlement agreement.

Sandpiper argues Baker’s lawsuit that resulted in the settlement “alleged the same facts giving rise to the issue of what was the real deal between Mrs. Baker and Mr. Pratt when Mrs. Baker deeded one half of the property to Mr. Pratt in the 1980s.”

But Baker’s lawsuit raised no such issues. The complaint simply alleged as background information: “On a check from Charles Pratt, in the memo section, it was written, words to the effect, ‘option to purchase.’ As a result of this notation, a 1/2 interest in the REAL PROPERTY was transferred to Charles Pratt. Upon information and belief Plaintiff alleges Charles Pratt transferred his interest in the REAL PROPERTY to Sandpiper Investments Inc. a Nevada Corporation (Hereinafter “SANDPIPER”). Thus, as such, title is currently vested with Barbara Baker, a widow, as to an undivided 1/2

interest and Sandpiper Investments Inc., a Nevada Corporation, an undivided 1/2 interest in the REAL PROPERTY.”

The complaint raised no issue as to the Pratts’ obligation to pay off the original Citizens Savings loan. That loan had been paid off years before Baker filed her complaint. The loan was paid from the proceeds of a loan on which Sandpiper was the sole obligor. The Citizens Savings loan was simply not an issue at the time Baker filed her complaint.

As to the issues relating to the First Bank loan, Sandpiper repeats its argument that the settlement agreement requires Baker to pay half. For reasons previously stated, the argument has no merit.

It is true the propriety of making payments with partnership funds on Sandpiper’s First Bank loan may have been an issue in the Baker litigation. In addition, the \$500,000 settlement paid by Sandpiper to Baker may have included reimbursement for the inappropriate application of partnership funds to payments on the loan up to the date of the settlement agreement. But neither the Baker litigation nor the settlement agreement encompassed what is at issue here: the application of partnership funds to Sandpiper’s First Bank loan that continued after the settlement agreement and Sandpiper’s demand made after the settlement agreement that Baker and FGI contribute to the payoff of the First Bank loan.

Sandpiper argues that because all of the allegations of the cross-complaint were “subsumed” within the settlement agreement and dismissal, the cross-complaint is barred by res judicata, collateral estoppel and retraxit. But all of the damages awarded by the trial court were for actions that occurred after the date the settlement agreement was signed. None were

“subsumed” within the settlement agreement or dismissal. Res judicata, collateral estoppel and retraxit are not a bar to claims that arise after the initial complaint is filed. (See *Allied Fire Protection v. Diede Construction, Inc.* (2005) 127 Cal.App.4th 150, 155 [“Res judicata is not a bar to claims that arise after the initial complaint is filed”]; *Alpha Mechanical, Heating & Air Conditioning, Inc. v. Travelers Casualty & Surety Co. of America* (2005) 133 Cal.App.4th 1319, 1331 [“[A] court will apply principles of res judicata to resolve precisely what causes of action or issues are barred as a result of the retraxit”].)

IV

Sandpiper contends there is insufficient evidence to support the trial court’s finding that Pratt agreed to assume the original Citizens Savings loan.

In viewing the evidence, we look only to “the evidence supporting the prevailing party.” (*GHK Associates v. Mayer Group, Inc.* (1990) 224 Cal.App.3d 856, 872.) We discard evidence unfavorable to the prevailing party as not having sufficient verity to be accepted by the trier of fact. (*Ibid.*) Where the trial court or jury has drawn reasonable inferences from the evidence, we have no power to draw different inferences, even though different inferences may also be reasonable. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 376, pp. 434-435.) The trier of fact is not required to believe even uncontradicted testimony. (*Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012, 1028.)

Sandpiper argues Baker testified she “thought” Pratt was supposed to pay the entire Citizens Savings note. Apparently Sandpiper believes Baker’s use of the word “thought” prevents her testimony from being considered substantial

evidence. But Sandpiper cites no authority requiring a witness to speak in absolute terms in order for her testimony to be considered substantial. Baker's testimony alone is sufficient to support the trial court's finding.

Sandpiper also disputes the trial court's conclusion that because the loan was about half the value of the property, it is reasonable that Pratt agreed to assume the entire loan. Sandpiper categorically states the conclusion is "untenable." We disagree.

Sandpiper argues that the parties paid the Citizens Savings loan with partnership funds for over 20 years and Baker never objected. But the Pratts refused to disclose how the partnership funds were being used and bullied Baker into silence. It is the same reason Baker accepted only \$1,000 per month instead of the full share that was due to her.

In fact, the Pratts paid the entire balance of the Citizens Savings loan with the proceeds of a loan on which Sandpiper, the Pratts' wholly owned entity, was the sole obligor. The Pratts never directly demanded contribution from Baker for the Citizens Savings loan pay-off. They only indirectly demanded contribution years later when they demanded Baker and FGI contribute to the First Bank loan.

Sandpiper contends that if Pratt agreed to pay the entire Citizens Savings loan, the agreement is barred by the statute of frauds.

But the statute of frauds bars only the enforcement of the contract; it does not bar admission into evidence of the terms of an oral contract for other purposes. (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 346, p. 392.) Here Baker is not applying to enforce Pratt's agreement to pay the Citizens

Savings loan. That loan was paid by a loan on which Sandpiper was the sole obligor. Instead, she is raising the agreement as a matter to be considered by the trial court in determining whether equity will require a contribution for an entirely different loan. Even if enforcement of Pratt's oral agreement was barred by the statute of frauds, the court properly considered evidence of the oral agreement in deciding Pratt's petition for equitable contribution. (See *Walter H. Leimert Co. v. Woodson* (1954) 125 Cal.App.2d 186 [evidence of unenforceable oral contract admitted for the purposes of imposing constructive trust].)

V

Sandpiper contends FGI's cross-complaint is barred by the statute of limitations.

The statute of limitations for breach of fiduciary duty and accounting is four years. (Code of Civ. Proc., § 343; *Manok v. Fishman* (1973) 31 Cal.App.3d 208, 213.) Sandpiper filed its complaint on January 9, 2012. FGI filed its cross-complaint alleging breach of fiduciary duty and accounting on January 31, 2013. The trial court determined that the four-year statute of limitations relates back to Sandpiper's January 9, 2012, complaint. The court's award of damages was limited to damages accruing after January 9, 2008.

The statute of limitations does not apply to causes of action alleged in a cross-complaint if the period has not run at the time of the commencement of the plaintiff's action. (*Jones v. Mortimer* (1946) 28 Cal.2d 627, 633; *Trindade v. Superior Court* (1973) 29 Cal.App.3d 857, 859.)

Sandpiper claims the rule applies only where the complaint and cross-complaint arise out of the same set of facts and circumstances. Assuming that to be so, the complaint and

cross-complaint are sufficiently related here. They both arise out of claims for money due from the operation of the apartment building.

Sandpiper argues that the three-year statute of limitations for fraud applies. But the trial court's award was based on breach of fiduciary duty. The statute of limitations for fraud is irrelevant.

The trial court properly applied the statute of limitations.

VI

Sandpiper contends the trial court erred in ruling that Baker's dismissal of her lawsuit had no effect on the obligations owed to FGI under the assignment.

Baker did not dismiss her lawsuit until after Sandpiper had notice of the assignment of her interest to FGI. The trial court simply ruled that after Sandpiper had notice of the assignment, Sandpiper's performance to Baker did not extinguish the obligation; instead, performance is owed to FGI. Thus Baker's dismissal of her lawsuit after Sandpiper had notice of the assignment had no effect on the obligations owed to FGI. That is a correct statement of the law. (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 732, p. 816 ["After notice of the assignment, performance by the obligor to the assignor does not extinguish the obligation"].)

VII

Sandpiper contends the trial court erred in not assessing FGI with the increase in property taxes that was due to the sale of Baker's half-interest.

But all tenants in common are bound to pay taxes in proportion to their interest. (*Conley v. Sharpe* (1943))

58 Cal.App.2d 145, 156.) Sandpiper cites no authority requiring the trial court to apply any other rule.

In addition, the trial court found that the Pratts forced Baker to sell her share in order to avoid further mistreatment. It would be inequitable to require Baker and FGI to pay the increase in property taxes that resulted from the Pratts' wrongdoing.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondents.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

Martin J. Tangeman, Judge
Superior Court County of San Luis Obispo

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